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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. 87-5277

TONY B. AMADEO,

Petitioner,

-vs-

RALPH KEMP, Warden,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Where the prosecutor intentionally discriminates based on race, gender and age in constructing grand and petit jury pools, and deliberately obscures prima facie evidence of discrimination resulting in the underrepresentation of blacks, women and young people, is a federal court barred from considering the merits of a post-conviction claim due to trial counsels' unknowing failure to object to the pool?

2. If the prosecutor's concealment of his attempt to manipulate grand and petit jury composition does not provide cause under Wainwright v. Sykes in a non-capital case, does the heightened reliability required by the Eighth Amendment provide a different standard of review such that a federal court should reach the merits of the claim despite trial counsel's failure to contemporaneously object to the prosecutor's covert exclusion of blacks, women and young people from the jury pool?

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OPINIONS BELOW

The decision of the Court of Appeals reversing the District Court's grant of habeas corpus relief is published. Amadeo v. Kemp, 816 F.2d 1502 (11th Cir. 1987). Both the majority and dissenting opinions are included in the Appendix at Tab i. The prior decision of the Court of Appeals vacating the District Court's earlier grant of habeas corpus relief is also published. Amadeo v. Kemp, 773 F.2d 1141 (11th Cir. 1985). The opinion of the state supreme court affirming petitioner's convictions and sentence of death on direct appeal appears at Amadeo v. State, 243 Ga. 627, 255 S.E.2d 718 (1979).

JURISDICTIONAL STATEMENT

Petitioner, Tony B. Amadeo, was convicted and sentenced to death in Georgia. The United States District Court for the Middle District of Georgia, Owens, J. presiding, has twice ruled that Mr. Amadeo's convictions and sentence of death were obtained in violation of the constitution because, inter alia, they were the direct result of underrepresentation and the prosecutor's manipulation of the grand and petit jury pool with respect to blacks, women or young people.

The Court of Appeals reversed the District Court on April 30, 1987. The Court of Appeals denied Mr. Amadeo's petition for rehearing on June 8, 1987. Accordingly, Mr. Amadeo petitions this Court for a writ of certiorari to review the decision of the Court of Appeals. The jurisdiction of this Court is therefore invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS UPON WHICH THE PETITION IS BASED

This petition turns on the Court of Appeals' interpretation of 28 U.S.C. §2254, and more specifically the court's reliance on the doctrine of Wainwright v. Sykes, 433 U.S. 72 (1977), to hold that petitioner's claim based on the prosecutor's deliberate and surreptitious manipulation of the grand and petit jury composition is procedurally barred. The gravamen of Mr. Amadeo's claim, and the basis for the District Court's ruling that his convic-

tions and death sentence were obtained in violation of the constitution, involves the equal protection clause of the Fourteenth Amendment and the Sixth and Fourteenth Amendment requirement that jury pools reflect a fair cross section of the community. More specifically, Mr. Amadeo argued, and the District Court found, that the prosecutor's directions to the county jury commissioners to limit the number of blacks, women and young people called for grand and petit jury service, but to exclude them in a way that did not create prima facie evidence of discrimination, was unconstitutional. The constitutional and statutory provisions upon which the petition is based are included in the Appendix at Tab v-b.

STATEMENT OF THE CASE

Tony B. Amadeo was indicted and tried for armed robbery and murder in the Superior Court of Putnam County, Georgia. At no point did Mr. Amadeo's trial counsel challenge the pool from which the grand or petit juryies were selected. Mr. Amadeo was convicted of both offenses and sentenced to death on November 30, 1977.

Mr. Amadeo appealed his convictions and sentence to the Georgia Supreme Court. While the appeal was pending, discovery pertaining to an unrelated voter registration suit disclosed that the prosecutor in Mr. Amadeo's case had deliberately set about to compile the master jury list to exclude representative numbers of blacks, women and young people, and limit their participation in a way that would not be legally cognizable. Bailey v.Vining, Civ. No. 76-199-Mac (M.D. Ga. Aug. 17, 1978), Appendix at Tab ii-b; 2d Supp. Record, Vol. I at 44.*

* Record citations refer to the record before the Court of Appeals. It is important to note that neither the parties nor the courts-below disputed the purpose or essential features of the prosecutor's scheme to subvert constitutionally acceptable jury selection procedures in Putnam County. See 2d Supp. Record, Vol. I at 67 (state concedes that jury lists were manipulated and that such covert tampering with jury composition did prejudice Mr. Amadeo); November 14, 1985 Order of the United States District Court for the Middle District of Georgia, at 1-2; Appendix at Tab ii-a (finding that there is no disagreement as to the facts, that memorandum by prosecutor directing that jury lists be drawn based on race and gender found to exist and that the memo-
[footnote continued]

Documents uncovered in the unrelated proceeding established that the prosecutor had sent the county jury commissioners a memorandum telling them to fix the number of blacks, women and young people in the master list at a percentage significantly lower than the percentage in the population, but not low enough to warrant a composition challenge. See Undated, unsigned prosecutor's memorandum, Appendix at Tab iv-a.

The undisclosed memorandum told the commissioners to fix the percentage of blacks in the grand and petit jury lists at levels of approximately 11% and 5%, respectively, less than the percentage of blacks in Putnam County. Id. The memo also instructed the commissioners to devise similar underrepresentations for women. Id.; Bailey v.Vining, supra.

The purpose of the scheme was thus to achieve underrepresentation of groups that the prosecutor deemed undesirable, but to do so in a way that would avoid detection. The scheme worked in the present case, as lawyers for Tony Amadeo were not aware of the prosecutor's surreptitious manipulation of the venires until after the case was on direct appeal. 2d Supp. Record Vol. I at 14-15, 26-28. The state conceded that this covert tampering with the master lists did take place, and that it was prejudicial to Mr. Amadeo. 2d Supp. Record, Vol. 1 at 67. November 14, 1985 Order of the United States District Court for the Middle District of Georgia, at 1-2; Appendix at Tab ii-a.

The prosecutor's tampering was by design and by effect a concealed and covert scheme. First, its very function was to avoid detection. That is, the prosecutor ordered that the numbers be fixed at levels that were clearly underrepresentative of blacks and women, and yet were not so low that even wary defense

footnote continued]
randum demonstrates "intense discrimination on the part of . . . governmental officials. . ."); 816 F.2d at 1507 (majority opinion of the Court of Appeals does not dispute character and effect of prosecutor's scheme, but does find issue procedurally barred); 816 F.2d at 1509 (Clark, J. dissenting, characterizes prosecutor's memorandum as the "smoking gun" that unequivocally establishes unconstitutional discrimination in the selection of jurors).

counsel would suspect either a prima facie disparity or foul play. Record, Vol. I at 147. See, Amadeo v. Kemp, 816 F.2d at 1509 (11 th Cir. 1987) (Clark, J. dissenting).

Second, the memorandum was not made a part of or connected to the current master list, which is the list from which Tony Amadeo's jury venire was drawn. Instead, it was placed somewhere in a stack of old master lists dating back to 1950, apart from the existing master list. 2d Supp. Record Vol. I at 41, 50; 816 F.2d at 1506-07.

After evidence of the prosecutor's illegal scheme came to light in the Bailey case, it was made available to Mr. Amadeo's appellate counsel. When the prosecutor's surreptitious scheme was disclosed to trial counsel, they agreed that had they known about the covert discrimination against blacks, women and young people, they would have challenged the composition of the venires. 2d Supp. Record Vol. I at 58, 62. Mr. Amadeo also testified that he was not made aware of the manipulation of the jury pool and would have challenged it. November 15, 1985 Hearing Transcript Before the District Court; Appendix at Tab iv.

Mr. Amadeo's attorneys moved to supplement his direct appeal. However, the state supreme court refused to reach the merits of the issue and affirmed Mr. Amadeo's convictions and sentence. Amadeo v. State, 243 Ga. 627, 255 S.E.2d 718 (1979). This Court denied certiorari. Amadeo v. State, 444 U.S. 974 (1979).

Counsel for Mr. Amadeo again challenged, inter alia, the legality of the prosecutor's scheme in a petition for state post-conviction relief. The issue was raised before the Superior Court of Putnam County, but relief was denied on February 29, 1980. The state supreme court declined review on September 10, 1980. An unrelated state post-conviction action was then filed in Butts County Georgia. It was dismissed and the Georgia Supreme Court declined review.

Having exhausted his state remedies, Mr. Amadeo then sought

federal habeas corpus relief in the United States District Court for the Middle District of Georgia, Owens, J. presiding. Among other issues, Mr. Amadeo claimed that the deliberate effort by the prosecutor to limit the participation of blacks, women and young people on the grand and petit juries rendered his convictions and death sentence unconstitutional. On May 17, 1984, District Court held, inter alia, that the prosecutor had deliberately excluded protected groups from the jury selection process, thereby violating Mr. Amadeo's constitutional rights. On September 27, 1985 the Court of Appeals, however, reversed the grant of the writ and directed the District Court to conduct an evidentiary hearing on the issue of trial counsels' failure to challenge the grand and petit jury pool and whether there was cause to excuse the apparent procedural default. Appendix at Tab i-c.

Following an evidentiary hearing, the District Court found that "view[ed] in its totality, this was a case of intense discrimination on the part of your governmental officials in this County." November 14, 1985 Order of the United States District Court for the Middle District of Georgia, at 1; Appendix at Tab ii-a. The court further found that "the composition of the [jury] box was exactly in accordance with what the District Attorney's office had suggested. He said 'Do it this way,' and they did it. . . . [W]e all agree that that was in reality intentional discrimination in the composition of the jury box which resulted in the box being unconstitutionally composed." Id. at 3.

The District Court expressly found that the issue was not procedurally barred. The court noted that it was reasonable for Mr. Amadeo's trial counsel to not challenge the composition of the grand and petit jury pool. Id. at 4. The court found that trial counsel did not know about the prosecutor's illicit scheme and that counsel did not deliberately bypass state procedures by failing to object to the jury arrays. Id. at 4-5. The court

ultimately ruled that the attorneys' ignorance --predicated as it was on the official misdeeds of the county prosecutor-- provided cause to excuse their failure to challenge the composition of the grand or petit jurys, and therefore the merits of the issue should be reached under Wainwright v. Sykes. Id. at 4-5.

A majority of the panel for the Eleventh Circuit Court of Appeals, however, disagreed with the findings and conclusion of the District Court. While the panel majority did not find that trial counsel had made a deliberate or tactical decision to forego a challenge to the jury based on the prosecutor's intentional subversion of representative arrays, the majority did find that defense counsel had elected to forego a jury challenge based on the racial composition of the venire per se, and because of that decision failed to discover the prosecutor's memorandum. 816 F.2d at 1507-08. Consequently, according to the majority, there was not cause to explain trial counsels' failure to litigate the jury issue and the District Court should not have reached the merits of the issue. Id. According to the dissent, the majority's analysis missed the mark and transformed default doctrine in a way that rewards the state for its own wrongdoing. 816 F.2d at 1508.

REASONS COMPELLING REVIEW

I.

WHERE THE PROSECUTOR BRINGS ABOUT THE UNDERREPRESENTATION OF BLACKS, WOMEN AND YOUNG PEOPLE ON GRAND AND PETIT JURY POOLS, AND HE DOES SO IN A WAY THAT DELIBERATELY OBSCURES PRIMA FACIE EVIDENCE OF DISCRIMINATION, CAUSE EXISTS TO REACH THE MERITS OF A POST-CONVICTION CLAIM DESPITE TRIAL COUNSELS' UNKNOWING FAILURE TO OBJECT.

When Tony Amadeo was indicted for capital murder, blacks comprised 31.4 percent of the box from which the grand jurors were chosen. Vol. I at 147. At the point Mr. Amadeo's trial lawyers selected a jury that would determine his guilt or innocence, and ultimately whether he should live or die, blacks made up 37 percent of the petit box. Id.

Thus, although the race composition of jury venires did not reflect the overall racial composition of the rural Georgia county

in which Mr. Amadeo was prosecuted, the disparities were not legally significant. Blacks were underrepresented on the grand and petit jury lists by 10.7 and 5.1 percent, respectively. Id.

Based on the apparent composition of the jury venires, a reasonable attorney would not have cause to challenge the manner in which jurors were selected. See Swain v. Alabama, 380 U.S. 202, 208-09 (1964) (10% underrepresentation in petit jury venires insufficient to establish prima facie evidence of discrimination); Preston v. Mandeville, 428 F.2d 1392, 1393 (5th Cir. 1970) (14.3% disparity constitutes prima facie evidence of discrimination). Little wonder, therefore, that Mr. Amadeo's trial counsel did not move to dismiss the indictment or object to the pool from which they selected a capital trial jury.

What neither counsel nor petitioner knew was that both the grand and petit jurors were selected via what a federal district court judge would later characterize as a process defined by systematic and intense race discrimination. November 14, 1985 Order of the District Court at 1; Petitioner's Appendix at Tab ii-a. Nor could counsel or petitioner have been aware of the unconstitutional manner in which the jury list had been compiled. That is so because, as subsequently found by the District Court, the discrimination was due to a covert scheme implemented by the county prosecutor. The prosecutor directed the jury commissioners to limit the participation of blacks, women and young people so that they were not equally represented on list, but to do so in a way that would not be legally cognizable. November 14, 1985 Order of the District Court at 3-5; Appendix at Tab ii-a. The prosecutor directed the commissioner to compile jury lists based on race, gender and age, but to select just enough people from each group so that prima facie evidence of discrimination would not exist. Id.

Despite the prosecutor's reprehensible and clear-cut violation of criminal defendants' constitutional rights to equal protection and a fair and impartial jury based on a representative

cross-section of the community, the Court of Appeals nevertheless held that the District Court acted improperly when it ruled that the wrong done to Mr. Amadeo could only be remedied through the conditional grant of a writ of habeas corpus. According to a majority of the Court of Appeals, despite the manner in which the prosecutor had covertly manipulated who would and who would not serve on grand and petit juryies based on race, gender and age, habeas corpus relief was inappropriate due to Mr. Amadeo's trial counsels' failure to object to the composition of the grand or petit juries. As noted by the dissent, however, "[s]uch a result rewards the state for its underhandedness and stretches the doctrine of Wainwright v. Sykes, beyond recognition." Amadeo v. Kemp, 816 F.2d 1502, 1508 (11th Cir. 1987) (Clark, J. dissenting).

A. Contrary to the Result Below, Cause Exists to Reach the Merits of a Claim Where State Action Results in the Deliberate Concealment of Evidence of Unconstitutional Conduct and Interfers with Compliance with State Procedural Requirements By Misrepresenting the Manner in Which Jury Venires Were Compiled.

The result below cannot be squared with the principles and precedent articulated by this Court or any sound and rational application of default doctrine. Under the doctrine of Wainwright v. Sykes, 438 U.S. 72 (1977), a defendant can establish cause for his trial counsel's failure to properly preserve an issue under state procedural rules in at least two circumstances. First, where the legal basis of a claim is unavailable because it is novel, cause may be established. Reed v. Ross, 468 U.S. ___, 83 L.Ed.2d 1 (1984). Second, where a defendant can show that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule," such as "a showing that the factual or legal basis for a claim was not reasonably available to counsel... or that 'some interference by officials'... made compliance impracticable," then this "would constitute cause under this [Wainwright] standard." Murray v. Carrier; 91 L.Ed.2d 397; 106 S.Ct. 2639 (1986), quoting Brown v. Allen, 344 U.S. 443, 486 (1953). See

Reed v. Ross, 468 U.S. at 14 (1984). Each of the various factors listed in Murray as sufficient to establish cause is directly applicable to this case. Each was ignored by the majority decision below.

Tony Amadeo's lawyers were not aware of the prosecutor's intentional jury discrimination at the time of trial. This was the purpose and effect of the covert scheme. Furthermore, evidence that the prosecutor ordered jury lists selected based on race, sex and age, and at the same time tried to conceal his effort by manipulating the jury list so that jury composition appeared legally unassailable, was unavailable until the prosecutor's memorandum to the jury commissioner was found. That document was kept apart from the current master jury list and was discovered in the course of an unrelated voter registration suit. 2d Supp. Record Vol. I at 41, 50.

Thus this is a case where the issue on which the state claims default is one that was "reasonably unknown" to counsel at the time of trial. Reed v. Ross, 468 U.S. 1, 14 (1984) (the "failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the [Wainwright] requirement is met."); Murray v. Carrier, 91 L.Ed.2d 397, 106 S.Ct. 2639 (1986) (same). Under Reed and Murray, cause is thereby established, and contrary to the result below, trial counsels' failure to challenge the grand or petit jury arrays does not bar a federal court from reaching the merits of Mr. Amadeo's claims.

Furthermore, the failure to discover the issue in this case was due completely to "'interference by officials'" in the Putnam County prosecutor's office. Murray v. Carrier, 106 S.Ct. at 2646. In fact, in this case the "interference" amounted to intentional concealment by the state prosecutor's office. Once again, therefore, cause is established and the inquiry should turn to a consideration of the merits of the issue.

Finally, the result below is at odds with the policy and principles that led this Court to embrace default doctrine. As

recognized by this Court, it is necessary to protect state procedural requirements and trial level contemporaneous objection rules for several reasons. Wainwright v. Sykes, 433 U.S. at 89-90. First, to prevent "sandbagging" and the withholding of claims from the trial court so that they might be used on appeal. Second, to maintain the perspective that the trial, and not appellate or post-conviction proceedings, is the "main event" in a criminal prosecution. Id. at 90. Finally, federalism requires that an equitable balance be struck between the duty to enforce constitutional rights and the procedural needs of a subordinate, but largely autonomous, state court system. Id.

None of these interests, however, would be furthered by a concept of cause that does not extend to a situation where the state deliberately conceals evidence of unconstitutional conduct and impedes the orderly adjudication of constitutional rights by masking the realities of its own practices. Surely, where the defense is unaware of discriminatory practices, those practices cannot be turned into issues to be withheld and subsequently used to secure appellate relief. Nor would their subsequent litigation in any way detract from the primacy of the trial. Indeed, litigation would add to such primacy by ensuring that lynchpin of trial process --the jury-- was fairly selected without resort to pernicious and unlawful methods or considerations.

Finally, it is precisely the equitable character of habeas corpus relief, see Kuhlman v. Wilson, ___ U.S. ___, 106 S.Ct. 2616, 91 L.Ed.2d 364, 377 (1986) (plurality opinion); Wainwright v. Sykes, 433 U.S. at 90-91; Fay v. Noia, 372 U.S. 391, 438 (1963), that above all else requires that cause for apparent procedural defaults be recognized where, as here, an issue is not timely litigated due to government deception and covert interference with the exercise of constitutional rights. As noted by the dissent below, it would be indeed ironic if a doctrine rooted in equity and comity were turned on its head and used to shield the deliberate subversion of pivotal constitutional principles.

Instead, as called for by the dissent, "[w]here the state's efforts to conceal its misconduct cause an issue to be ignored at trial, the state should not be allowed to rely on its procedural default rules to preclude federal habeas review." 816 F.2d at 1513.

B. Review Is Necessary to Resolve the Conflict Between the Decision Below and the Tests for Cause Employed By Other Federal and State Courts of Appeals.

The result below is in conflict with procedural default doctrine as developed by other federal and state courts of appeals. Other courts have clearly recognized that where the failure to timely litigate a constitutional issue is due to prosecutorial misrepresentations, the state is estopped from asserting a procedural bar. For example in Freeman v. Georgia, 599 F.2d 65 (5th cir. 1979), the prosecution misled trial counsel concerning the nature of missing witnesses' potential testimony. The court of appeals ruled that due to the misrepresentation, the state could not claim that habeas corpus relief pursuant to Brady v. Maryland, 373 U.S. 83 (1963) was barred due to defense counsel's failure to exercise due diligence in making independent efforts to locate the witnesses. Id..

Similarly, state courts have also recognized that where a constitutional violation is inseparable from state efforts to conceal misconduct, the issue is not defaulted because the defendant was unable to raise it contemporaneously in accord with state procedural rules. Thus, in Smith v. Zant, 250 Ga. 684, 307 S.E.2d 37 (1983), the prosecution introduced evidence and argued to the jury that the testimony of an accessory-informant was not influenced by any deals or offers. Following his direct appeal and initial state post-conviction action the defendant learned that prior to trial the witness had been told that he would be prosecuted on a capital charge unless he implicated the defendant.

The state argued that the merits of the Giglio v. United States, 405 U.S. 150 (1972) and Napue v. Illinois, 360

U.S. 264 (1958) claim need not be reached. With due diligence, according to the state, the defense could have independently discovered and established that the witness had in fact been influenced by an offer of partial immunity. Therefore, the claim had been waived.

The state supreme court soundly rejected any such extension of default doctrine. Smith v. Zant, 250 Ga. 684, 307 S.E.2d 37. Instead the court held that the concealment of evidence by the prosecution provided cause obviating the defendant's otherwise untimely litigation of the claim.

Other appellate courts have found cause to reach the merits of an issue despite a procedural default where a constitutional violation is deliberate. Thus, in Wilson v. Murray, 806 F.2d 1232 (4th Cir. 1986), the court articulated a rule that where "the state's conduct so blatantly violated the rule laid down in Edwards [v. Arizona]... it satisfied the cause and prejudice standard of Wainwright." Id. at 1236 n. 2. citing Engle v.Isaac, 456 U.S. 107, 135 (1982). Hence, the intentional violation of constitutional rights alone, even where that violation does not entail the suppression of evidence material to the claim, provides cause to excuse procedural noncompliance.

In marked contrast with the precedent of this and other courts, the court-below ruled that Mr. Amadeo's trial counsels' failure to object to the grand or petit jury arrays prior to trial barred relief based on the prosecutor's covert manipulation of the racial, gender and age composition of the venires. This is so even though the prosecutor set out to mislead defense counsel so that the composition of the venires would not be challenged. The lower court's radical extension of default doctrine requires this Court's review so that it may be harmonized with decisions and principles governing default doctrine.

II.

WHERE THE PROSECUTOR SURREPTITIOUSLY MANIPULATES THE COMPOSITION OF THE JURY IN A CAPITAL CASE, THE HEIGHTENED RELIABILITY REQUIRED BY THE EIGHTH AMENDMENT PROVIDES CAUSE TO REACH THE MERITS OF THE CLAIM EVEN THOUGH TRIAL COUNSEL DID NOT OBJECT TO THE VENIRES AT TRIAL.

It is beyond dispute that the irrevocable character of a death sentence carries "a correspondingly greater degree of scrutiny of the capital sentencing determination." Turner v. Murray, ___ U.S. ___, 90 L.Ed.2d 27 36 (1986), quoting, California v. Ramos, 463 U.S. 992, 998-99 (1983). See also Caldwell, v. Mississippi, 472 U.S. ___, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) (O'Connor, J. concurring); Eddings v. Oklahoma, 455 U.S. 155 (1982); Gardner v. Florida, 430 U.S. 349 (1977) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280 (1976). It is also established that because of the unique and pivotal role of the jury in capital decision-making, Caldwell, supra; Turner, supra, the Eighth Amendment requirement of heightened reliability directly affects matters pertaining to jury selection.

For example, with respect to voir dire, this Court has long recognized that absent "special circumstances" the constitution does not require that prospective jurors be examined concerning race. Ristaino v. Ross, 424 U.S. 589 (1976). Where the prosecution is based on an interracial offense, however, in a capital case this Court has held that race is a special circumstance, per se. Turner v. Murray, 90 L.Ed.2d at 37. Moreover, in such a case if the trial court prevents voir dire on the issue of race there is an "unacceptable risk of racial prejudice infecting the capital sentencing proceeding." Id. at 37. Without the rule recognized in Turner this Court was afraid that a jury would be unable to "make a 'highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves.'" Id. at 35 (citations omitted).

In the case at bar, Mr. Amadeo's right to a fair and impartial jury was affected by conduct far more pernicious than in Turner. The same, if not greater, risk exists that jurors selected in part based on invidious concerns --race,

gender and age-- would not fully be able to properly deliberate whether petitioner should live or die.

As in Turner, this Court should consider and recognize the necessity of procedural safeguards that ensure the reliability of capital proceedings. This Court should therefore review the decision below to determine whether the constitutional requirements of a capital proceeding carry a special test for cause that is satisfied where as here the prosecution knowingly and surreptitiously subverts rights associated with the integrity and reliability of the proceedings.

CONCLUSION

The prosecutor in the case at bar deliberately and surreptitiously set out to undermine critical constitutional rights. He expressly instructed the county jury commissioners to compile jury lists based on race, gender and age, but to include sufficient numbers of each group so as to not trigger a judicial challenge. By design the prosecutor's effort included the attempt to make a blatantly unconstitutional practice appear constitutional.

Yet because the prosecutor's scheme succeeded, and the venires did not appear to be facially invalid, defense counsel failed to object until the prosecutor's actions were uncovered well after petitioner was tried and sentenced to death. As such, this Court ought to review the decision of the majority below, with its misplaced reliance on procedural default doctrine to overturn the District Court's proper grant of relief. The petition should be granted so that the result below may be harmonized with the principles and precedent of this and other courts.

Respectfully submitted,

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counsel's tactical decision was reasonable under the circumstances and denied the writ. *Id.* at 600–01. *See also Straight v. Wainwright*, 772 F.2d 674, 677–78 (11th Cir.1985), *cert. denied*, — U.S. —, 106 S.Ct. 1502, 89 L.Ed.2d 903 (1986). The present case calls for a similar result.[10]

In summary, we hold that introduction of "other crimes" evidence by the prosecution did not deny Amadeo a fair trial and that he has not established sufficient "cause" to overcome his procedural default in failing to object to the composition of the master jury lists. Accordingly, the district court erred in granting the writ of habeas corpus.[11]

The judgment of the district court is REVERSED and the case is REMANDED for proceedings consistent with this opinion.

CLARK, Circuit Judge, dissenting:

This case involves a scheme by the county solicitor's office and the county jury commission to limit the number of blacks on grand and petit jury lists in Putnam County, Georgia. The scheme included a coverup intended to mask the impropriety by keeping the percentage of black jurors within statistical guidelines mentioned in the prevailing case law. The majority holds that a defendant who did not learn of the underlying scheme until after his trial is barred from raising that claim in federal court because of procedural default. Such a result rewards the state for its underhandedness and stretches the doctrine of *Wainwright v. Sykes* beyond recognition. Accordingly, I dissent.

I. FACTS

We remanded this case to the district court for a hearing to determine whether "the defects in the jury composition were ... reasonably discoverable by [Amadeo's] counsel and [whether] the decision not to challenge the composition was ... a deliberate bypass." *Amadeo v. Kemp*, 773 F.2d 1141, 1145 (11th Cir.1985). After holding such a hearing, the district court found that petitioner had demonstrated sufficient "cause" for his failure to object at trial to the composition of the master jury list. Although the majority does not explicitly state the standard of review employed in this case, I assume the factual findings underlying the district court's legal ruling are accepted as true unless they are clearly erroneous.

At the evidentiary hearing, the state conceded that the county intentionally discriminated against blacks in the selection of prospective jurors and that the prejudice prong of *Wainwright v. Sykes* was established. 2d Supp. Record, Vol. I at 67. The undisputed evidence of this discrimination was first presented in *Bailey v. Vining*, No. CIV 76–199–MAC (M.D.Ga. Aug. 17, 1978). In *Bailey*, a civil case, plaintiffs challenged Putnam County's voter registration and juror selection procedures. Judge Owens, the district judge in the instant case, was also the judge in *Bailey*. As a result of *Bailey*, the county was required to revise its juror selection procedures. The following version of the pre–1978 jury selection procedures in Putnam County is uncontroverted.

1. *The Discriminatory Scheme.*

Prior to Amadeo's indictment, the Putnam County Solicitor's (now the District Attorney's) Office advised the county jury commission to recompile the grand and petit jury lists in a manner that would under-represent blacks by a percentage just small enough to avoid challenges based solely on statistical evidence. Specifically, a memorandum from the prosecutor's office advised the commission to place the names of 101 blacks in the grand jury pool and 298 blacks in the petit jury pool. Petitioner's Exhibit 4.[1] Such racial precision was possible because the master jury list was drawn from voter registration cards which were kept in two separate groups, one for blacks and one for whites. The memorandum indicated that the percentage of blacks in the eligible population was 42.1%, and that the selection of 101 blacks for the grand jury list would raise the percentage of blacks on that list to 31.4%. In addition, blacks would constitute 37% of those on the petit jury list. The disparity between the percentage of blacks in the grand and petit jury pools and the percentage of blacks in the population would be 10.7% and 5.1%, respectively.

2. *The Coverup.*

The size of this disparity was sufficiently small to prevent a challenger of the jury lists from establishing a prima facie case of racial discrimination. *Compare Swain v. Alabama*, 380 U.S. 202, 208–09, 85 S.Ct. 824, 829, 13 L.Ed.2d 759, 767 (1964) (10% underrepresentation not enough to establish prima facie case) with *Preston v. Mandeville*, 428 F.2d 1892, 1893–94 (5th Cir.1970) (14.3% underrepresentation sufficient to establish prima facie case). The district court, relying in part on its work in a prior civil case against Putnam County, found that the district attorney's office memorandum suggested the 10.7% and 5% disparities in order to prevent defendants from establishing prima facie cases of discrimination. Record, Vol. I at 147.

The jury commissioners followed the advice in the prosecutor's memorandum. Thus, the pre–1978 jury lists in Putnam County were compiled according to racial quotas which are clearly unconstitutional. *See, e.g., Cassell v. Texas*, 339 U.S. 282, 290, 70 S.Ct. 629, 633, 94 L.Ed. 839, 849 (1950).[2] More importantly for purposes of this case, the discriminatory scheme was designed to make detection by defendants nearly impossible. The jury pools appeared to be fairly integrated. Even if a challenge was made in any particular case, it was almost sure to fail because of a lack of proof. Only a defendant possessing direct evidence of intentional discrimination could hope to mount a successful challenge to the grand or petit jury.

3. *The "Smoking Gun."*

The testimony at the evidentiary hearing showed that Amadeo's attorneys did not know of the intentional discrimination by the jury commissioners until several months after Amadeo's trial. In early 1978, Amadeo's counsel was contacted by Christopher Coates, an attorney for the plaintiffs in a voting rights case against Putnam County. As part of his background research in the voting rights case, Coates surveyed "all the jury materials for a 20 to 30 year period." 2d Supp. Record at 42. Coates found the "smoking gun" memorandum from the district attorney's office somewhere in the middle of the mass of documents he obtained from the county clerk. 2d Supp. Record at 50.

Amadeo's counsel immediately incorporated the jury discrimination issue into his

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10. Since we conclude that Amadeo has failed to establish "cause" for his procedural default, we do not address the issue of "actual prejudice" or reach the merits of his jury challenge.

11. Amadeo raised eight issues in his federal petition for habeas corpus. He claims that the jury lists were unconstitutional, that the admission of the "other crimes" evidence denied him a fair trial, that his confession was involuntary, that trial counsel was ineffective, that the trial court gave improper jury instructions on armed robbery, mitigating circumstances and the jury's right to recommend a life sentence, and that the Supreme Court of Georgia failed to properly evaluate the proportionality of his death sentence. The district court considered only the first two issues when it granted the writ. The failure to address the six remaining issues requires a remand for the resolution of these questions.

1. The memorandum also suggested limiting the number of women and people under age 25 on the master jury lists.

2. Although Amadeo is white and blacks were unconstitutionally excluded from the jury array, he nonetheless has standing to raise his challenge here; for, "whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law." *Peters v. Kiff*, 407 U.S. 493, 504, 92 S.Ct. 2163, 2169, 33 L.Ed.2d 83 (1972). *See Duren v. Missouri*, 439 U.S. 357, 359 n. 1, 99 S.Ct. 664, 661 n. 1, 58 L.Ed.2d 579 (1979) ("A criminal defendant has standing to challenge exclusion resulting in a violation of the fair-cross-section requirement, whether or not he is a member of the excluded class."); *Taylor v. Louisiana*, 419 U.S. 522, 526, 95 S.Ct. 692, 696, 42 L.Ed.2d 690 (1975) (male defendant had standing to raise "the claim that the exclusion of women from jury service deprived him of the kind of factfinder [sic] to which he was constitutionally entitled").

appeal to the Georgia Supreme Court. That court refused to entertain the claim because it had not been raised at trial. *See Amadeo v. State*, 243 Ga. 627, 255 S.E.2d 718 (1979), *cert. denied*, 444 U.S. 974, 100 S.Ct. 469, 62 L.Ed.2d 389 (1979). The district court, after hearing testimony from counsel, held that this issue was not barred from federal review because Amadeo had demonstrated cause for his failure to object at trial. The majority's reversal of that decision ignores the policies underlying *Wainwright v. Sykes*, and ignores the fact-finding role of the district court.

II. ANALYSIS

Francis v. Henderson, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976), announced the rule that federal habeas courts may not entertain procedurally defaulted grand jury challenges by state prisoners absent a showing of "cause" and "actual prejudice." The decision brought the law regarding procedural defaults by state prisoners into line with the law regarding procedural defaults by federal prisoners. *See Davis v. United States*, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973). Federalism concerns required giving at least as much deference to state procedural rules as is given to the corresponding federal rules in federal courts. *Francis*, 425 U.S. at 541–42, 96 S.Ct. at 1711.

In *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), the Court extended the *Francis* "cause" and "prejudice" test to a case involving a failure to contemporaneously object to an error at trial. *Sykes* reiterated the federalism concerns of *Francis*, and gave several examples of how failure to honor the state's contemporaneous objection rules would be an affront to principles of comity. First, it might "encourage 'sandbagging' on the part of defense lawyers, who may take their chances of a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." *Id.* at 89, 97 S.Ct. at 2508. Second, it might "detract from the perception of the trial of a criminal case in state court as a decisive and portentous event." *Id.* at 90, 97 S.Ct. at 2508.

These comity based concerns need to be balanced against the role of the federal habeas court as a tribunal of last resort for state prisoners. Thus, the "cause" and "prejudice" test is designed to ensure the adjudication of federal claims in federal court where the failure to do so would result in a miscarriage of justice. *Id.* at 90–91, 97 S.Ct. at 2508. Consistent with this goal, "this court has ... attempted to secure defendants who have not strategically withheld constitutional objections in state court from the possibility of injustice." *Huffman v. Wainwright*, 651 F.2d 347, 351 (5th Cir. Unit B July 1981).

As the majority indicates, any attempt to define cause must take into consideration the federalism principles identified in *Sykes* as well as the overriding duty of the federal habeas court to avoid manifest injustice. *Ante* at 1505. On the facts of this case, both of these factors lead me to the conclusion that Amadeo has demonstrated cause for his failure to raise his jury challenge at the trial level.

The most important comity concerns discussed in *Sykes* simply are not involved in this case. The district court found that Amadeo's counsel did not "deliberately bypass" the state trial court. 1st Supp. Record, Tab 16 at 5. There is no evidence of "sandbagging." At the time of trial, counsel had no reasonable basis for challenging the master jury lists. Since the "smoking gun" memorandum was discovered after trial by a different attorney in an unrelated case, there is no indication that Amadeo was holding back his federal claim as "trump card" hoping for a favorable verdict. In fact, the district court specifically found that Amadeo's counsel *would* have raised the jury claim at trial if they had known about the solicitor's memorandum. Based on counsel's testimony at the evidentiary hearing, this factual finding is not clearly erroneous.

The majority suggests, *ante* at 1506–1507, that Amadeo's counsel (William Prior and Roy Lambert) considered an objection to the jury array but decided, as a matter of tactics, to proceed with the jury that was picked. This argument misses the mark for several reasons. First, the claim which counsel considered at trial was a challenge to the composition of the jury array based on *statistical underrepresentation*. One can hardly fault Amadeo's attorneys for rejecting such a challenge, since the racial composition of the array did not suggest a sufficient underrepresentation of blacks to warrant much concern. Indeed, the unconstitutional jury selection process had been specifically designed to withstand challenges based on statistical evidence. Under these circumstances, counsel's pretrial discussions regarding a possible statistical challenge should not preclude Amadeo from raising a claim based on (newly discovered) direct evidence of intentional discrimination in the juror selection process.

Second, a challenge to the jury array is not the same as a challenge to the master jury list. At the evidentiary hearing, Amadeo's counsel noted that the actual array chosen for Amadeo's trial appeared to be fairly integrated. What counsel could not see by looking at the array was that the array was chosen from a master list which was specifically designed to underrepresent blacks. The infection of the selection system at the master list level is not cured by the random selection of arrays from that master list. Once the master list is affected by discriminatory selection procedures, the juries chosen from that list are tainted. It is nearly impossible to predict what type of jury would have been selected if the master list had been compiled in a constitutional manner. Nor is it certain how such a jury would have decided this case. For these reasons, the Supreme Court has indicated that, where the jury has been chosen according to racially discriminatory procedures, prejudice to the defendant is presumed. *See Peters v. Kiff*, 407 U.S. 493, 504–05, 92 S.Ct. 2163, 2169, 30 L.Ed.2d 83 (1972); *cf. Rose v. Mitchell*, 443 U.S. 545, 550–59, 99 S.Ct. 2993, 2997–3002, 61 L.Ed.2d 739 (1979) (discrimination in selection of grand jury not rendered harmless by subsequent conviction by petit jury).

Third, the majority ignores important factual findings made by the district court. After hearing testimony from Amadeo's counsel, the court found that the pressures of being a lawyer in a small rural community served as an effective deterrent against raising claims of jury discrimination. Such claims would necessarily impugn the integrity of county officials, and would jeopardize the lawyer's standing in the community. 1st Supp. Record, Tab 16 at 2. Notwithstanding these community pressures, the court concluded "that if [counsel] had known of the memorandum that in spite of the local hesitancy on the part of lawyers to challenge the box, that they, nevertheless, would have had backbone enough to do so." *Id.* at 4. This finding clearly indicates that counsel did not make a strategic decision to hold back the jury claim in the hopes of obtaining a favorable verdict at trial.

A second comity concern stressed in *Sykes* is the desire to ensure that the trial remains the "main event" in the criminal process. This concern is most important where a defendant deliberately bypasses the opportunity to raise an available claim at trial. It is even relevant where counsel's failure to raise the issue was the result of negligence. *See Murray v. Carrier*, — U.S. —, 106 S.Ct. 2639, 2645–46, 91 L.Ed.2d 397 (attorney "inadvertence" or "ignorance" does not constitute cause under *Sykes*). By refusing to entertain claims "negligently" bypassed, federal courts provide an incentive to the bar to exercise the utmost care in recognizing and raising meritorious claims at trial.

The above concern is irrelevant, however, where neither the defendant nor his counsel were at fault for the procedural default. *See Reed v. Ross*, 468 U.S. 1, 14–16, 104 S.Ct. 2901, 2909–10, 82 L.Ed.2d 1 (1984).[3]

3. For this reason, the majority's reliance on *Birt v. Montgomery*, 725 F.2d 587 (11th Cir.) (en banc), *cert. denied*, 469 U.S. 874, 105 S.Ct. 232, 83 L.Ed.2d 161 (1984), is misplaced. In *Birt*, the only asserted "cause" for failing to raise the jury claim was that counsel rendered ineffective assistance. We *rejected* the ineffectiveness claim and thus found there was no "cause for the defendant's failure to object at trial. *Id.* at 596–601. In the instant case, Amadeo does not al-

The majority suggests counsel was "at fault" because the "smoking gun" memorandum which set forth the county's plan to rig the jury lists was "readily discoverable in the county's public records." *Ante* at 1507. Further, the majority speculates that "[h]ad counsel elected to examine the jury lists, they would have found the memorandum." *Id.*

The majority's "factual findings" are troubling for several reasons. First, there simply is no factual support in the record for the proposition that the memorandum was "readily discoverable" or that Amadeo's counsel "would have found the memorandum" if they had looked. Christopher Coates, the attorney who found the memorandum, testified that he was conducting a broad investigation as to whether blacks historically had been underrepresented in Putnam County. As part of his research, he set out to survey all of the jury materials for a twenty to thirty-year period. Although he did not recall precisely where he found the incriminatory memorandum, he remembered that "it was not on the first page of the materials I was perusing, but somewhere in the stack of materials that [the county clerk] gave me . . . it wasn't on top. I found it because I was going through all the materials." 2d Supp. Record at 41, 50. This testimony belies the majority's assertion that the document was "readily available." Furthermore, it is not at all clear that a search by counsel would have led them to this document. The majority does not suggest counsel should have reviewed twenty years worth of documents as part of their pretrial preparation in this case. It is at least as reasonable to assume counsel would have reviewed only the current jury lists. Since the memorandum was found in the middle of a stack of older documents, I find the majority's factual inferences to be unreasonable.

Moreover, even if there had been no obfuscatory behavior by county officials, it is unreasonable to expect counsel to conduct a detailed search of the county court records. By its holding, the majority deprives petitioner of a forum for his claim because his attorneys, who were facing the usual rigors of pretrial preparation in a capital case, did not find the time to scour the public records in search of evidence of intentional discrimination. Such a ruling ignores the realities of capital defense work and, more importantly, is not necessary to ensure that the trial is the "main event" in the criminal process. Absent some reason to suspect jury tampering (such as statistical evidence of underrepresentation), defense counsel would almost never be able to afford the luxury of examining all "publicly available" documents for favorable evidence. This realization is the basis for the holding in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (requiring prosecutorial disclosure of evidence favorable to defendant). Defense counsel must be able to rely on the candor of the prosecutor's office. Where the prosecutor's office is a party to the scheme to underrepresent blacks on jury lists, it is particularly unreasonable to expect defense counsel to uncover such malfeasance.

In this respect, this case is analogous to *Reed v. Ross*, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984). In *Reed*, the Court held that "where a constitutional claim is so novel that its *legal* basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures." *Id.* at 16, 104 S.Ct. at 2910 (emphasis added). In the instant case, the *factual* basis of Amadeo's constitutional claim was not reasonably available to counsel. In such a case, as in *Reed*, "it is safe to assume that [counsel] is sufficiently unaware of the [constitutional] question's latent existence that we cannot attribute to him strategic

lege his attorneys were ineffective for failing to raise the jury claim. Amadeo claims counsel could not have raised the claim at trial because the evidence of intentional discrimination was not discovered until after trial. Furthermore, he argues his attorneys lacked sufficient evidence to challenge the jury on the basis of statistical underrepresentation. The allegations of state misconduct in concealing the constitutional violation are sufficient to distinguish this case from *Birt*.

motives of any sort." *Id.* at 15, 104 S.Ct. at 2909–10.

Finally, I cannot ignore the fact that the county did its best to conceal this constitutional violation. The discriminatory scheme was carefully designed to achieve the maximum underrepresentation of blacks without allowing criminal defendants to use the statistical disparity to establish prima facie cases of jury discrimination. The only direct evidence of this scheme was buried somewhere in a stack of documents in the county clerk's office. Under the circumstances, certainly it is no coincidence that this evidence was discovered by an attorney conducting discovery in a civil case. Without the benefit of a prima facie case, criminal defendants and their counsel are unlikely to undertake massive investigations to uncover direct evidence of intentional discrimination.

The fact that the jury issue did not surface at trial is largely attributable to the intentional concealment by the county. Recent decisions by the Supreme Court and by our court provide support for the proposition that such misconduct by the state can constitute "cause" for failure to raise an issue at trial. In *Murray v. Carrier*, — U.S. —, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), the Court noted that "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule." *Id.* at —, 106 S.Ct. at 2646. We have applied this language to excuse default under circumstances significantly less compelling than those in the present case. In *Dorman v. Wainwright*, 798 F.2d 1358 (11th Cir.1986), the defendant dismissed his direct appeal in state court because he had not received a transcript of his trial. Under state law, the defendant's voluntary dismissal of his appeal barred him from further review of alleged trial errors. However, since it was the state's responsibility to furnish the transcript, we found it unnecessary to apply the state's procedural default rule in federal court:

> The state's failure to provide Dorman with a trial transcript within a reasonable time to perfect his appeal constitutes an external factor out of Dorman's control that suffices as "cause" for the dismissal of the direct appeal.

Id. at 1370. It is inconceivable to me that the state misconduct in the present case would not constitute "cause" while the failure to provide a transcript would suffice to make such a showing. *Cf. Freeman v. Georgia*, 599 F.2d 65, 71–72 (5th Cir.1979) (where defense counsel was misled to believe missing witness would be unfavorable, defendant could not be held responsible for counsel's failure to make attempts to locate that witness), *cert. denied*, 444 U.S. 1013, 100 S.Ct. 661, 62 L.Ed.2d 641 (1980); *Barbee v. Warden, Maryland Penitentiary*, 331 F.2d 842, 845 (4th Cir.1964) (where defense counsel was misled into thinking ballistics test results supported state's theory, counsel's failure to make a specific request for the test results was excused).

The misconduct in this case is particularly egregious because the county prosecutor's office initiated the discriminatory scheme. The prosecutor's knowledge of the prevailing standards for establishing a prima facie case of jury discrimination was the key to the effective concealment of the discriminatory scheme. The prosecutor's office is under a special duty to be candid in criminal cases and I would hope that this duty would be scrupulously honored where the defendant's life is at stake. The thought of one arm of the prosecutor's office suggesting methods to shield unconstitutional jury selection processes while another arm of the prosecutor's office argues to this court that defense counsel should have searched the public records for evidence of the scheme is unconscionable.

In sum, comity concerns do not require that we reward the state for its own misconduct. In fact, the interests of justice mandate that we consider the merits of Amadeo's claim. Where the state's efforts to conceal its misconduct cause an issue to be ignored at trial, the state should not be allowed to rely on its procedural default rules to preclude federal habeas review. *See Freeman, supra.* Such a result is not

required by *Sykes*, nor is it permitted under our prior cases.

Because I believe Amadeo has shown "cause" for his failure to raise the jury issue at trial, and because the existence of "prejudice" is uncontested, I would affirm the district court's order granting the writ in this case.

Herman CORN, Plaintiff-Appellant,

v.

CITY OF LAUDERDALE LAKES, Defendant-Appellee.

No. 85-6024.

United States Court of Appeals, Eleventh Circuit.

May 14, 1987.

Landowner brought § 1983 action against city seeking money damages for regulatory taking of his property in violation of constitutional rights. The United States District Court for the Southern District of Florida, No. 84-6034-CIV-JAG, José A. Gonsalez, Jr., J., dismissed action, and appeal was taken. The Court of Appeals, Kehoe, District Judge, sitting by designation, held that landowner's claim for money damages under § 1983, stemming from regulatory taking of his property in violation of constitutional rights, was ripe for review based on finality of zoning decision and lack of alternative remedy under Florida law.

Reversed.

1. Federal Courts ⇐13.25

Finality is manifested, for purpose of determining whether § 1983 claim for money damages stemming from regulatory taking of property in violation of federal constitutional rights is ripe for review on merits, by showing that there is no beneficial use to which property may be put. 42 U.S.C.A. § 1983.

2. Civil Rights ⇐13.9

Subject ordinances challenged by landowner called for complete moratorium on landowner's development of his property, and any request for variance would plainly have been futile, so that zoning decision upon which landowner based his present claim under § 1983 was final one for purpose of determining whether action stemming from regulatory taking of property in violation of federal constitutional rights was ripe for review on merits. 42 U.S.C.A. § 1983.

3. Federal Courts ⇐13.25

Landowner's claim for money damages under § 1983, stemming from regulatory taking of his property by city in violation of his constitutional rights, by enactment of zoning ordinance subsequently declared unconstitutional, was ripe for review based on finality of zoning decision, and lack of any alternative remedy recognized by Florida, such as inverse condemnation action, or action for money damages, based either on trespass or violation of right of due process. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amends. 5, 14; West's F.S.A. Const. Art. 1, § 9.

Gary M. Farmer, Ft. Lauderdale, Fla., for plaintiff-appellant.

Jean Freeman Reed, Morgan, Lewis & Bockius, Miami, Fla., for defendant-appellee.

Appeal from the United States District Court, Southern District of Florida.

Before VANCE and ANDERSON, Circuit Judges and KEHOE *, District Judge.

* Honorable James W. Kehoe, U.S. District Judge, Southern District of Florida, sitting by designation.